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## Foreign Arbitral Awards and the Second Circuit: Enforcement Considerations for Annulments

Calvin Jonker

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# FOREIGN ARBITRAL AWARDS AND THE SECOND CIRCUIT: ENFORCEMENT CONSIDERATIONS FOR ANNULMENTS

Calvin Jonker\*

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## INTRODUCTION

Many international business transactions integrate an arbitration clause into the agreement as companies choose to keep potential disputes out of the court systems.<sup>1</sup> Enforcement of the awards rendered pursuant to

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\* J.D. Pepperdine University School of Law 2019; Certificate in Dispute Resolution from the Straus Institute for Dispute Resolution.

<sup>1</sup> See generally Richard R. W. Brooks & Sarath Sanga, *Commercial Arbitration Agreements Between Sophisticated Parties: An Empirical View*, SEMANTIC SCHOLAR (2013),

such agreements is straightforward in the United States thanks to the Federal Arbitration Act, as long as the United States is the forum for the arbitration proceeding.<sup>2</sup> Even if the forum is outside of U.S. jurisdiction, several treaties, namely the Panama Convention<sup>3</sup> and the New York Convention,<sup>4</sup> provide for recognition of a foreign arbitrated award by U.S. courts, as well as recognition by U.S. courts of any annulment or suspension judgments rendered by courts in the State where the arbitration proceeding took place.<sup>5</sup>

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<https://pdfs.semanticscholar.org/7b40/3f93d2fdc59aa8d7e1ea55da8ec0c787e00d.pdf>. International commercial agreements are more likely than their U.S. domestic counterparts to include an arbitration clause. *Id.* at 12–14.

<sup>2</sup> See 9 U.S.C. § 2 (2006). Agreements in writing to arbitrate current or future controversies “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.*

<sup>3</sup> The Inter-American Convention on International Commercial Arbitration, or “Panama Convention,” went into effect in 1976. 14 I.L.M. 336 (1975) [hereinafter Panama Convention]. It provided for “enforcement of foreign arbitral awards in Latin America,” which had been previously governed by a less-than ideal mélange of three separate treaties (to none of which the United States had been a party). John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 Am. Rev. Int’l Arb. 1, 7–8 (2000). The Panama Convention was intended to achieve the same results as the New York Convention and has been successful in this to a large extent. *Id.* at 21–23.

<sup>4</sup> The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or “New York Convention,” entered into force in 1959. 21 UST 2517 [hereinafter New York Convention]. See also 9 U.S.C. § 201 (2006) (the US Code section codifying the treaty). The New York Convention primarily concerns itself “with the arbitration agreement and award—the starting and ending points of the arbitral process—and not with the conduct of the proceedings, except as that conduct may impair the award.” See Bowman, *supra* note 3, at 24. For the purposes of this analysis, this difference is irrelevant, as the on-point sections of the conventions, the Panama Convention’s Article 5 and the New York Convention’s Article V are verbatim in relevant parts. When both Conventions apply and all parties to the arbitration are citizens of states that are signatories to the Panama Convention, the Panama Convention governs. *Id.* at 93–94.

<sup>5</sup> Both conventions create a presumption of recognition. See Panama Convention, *supra* note 3, at art. 4 (“[a]n arbitral decision or award that is not appealable . . . shall have the force of a final judicial judgement”); see also New York Convention, *supra* note 4, at art. III (“[e]ach Contracting State shall recognize arbitral awards as binding and enforce them”); see also Bowman, *supra* note 3, at 83–84 (“a movant seeking to confirm an award falling under the Panama

However, two recent cases heard by the United States Court of Appeals for the Second Circuit have shed light on the intricacies of enforcing foreign judgments, specifically when such judgments annul arbitrated awards that have already been recognized by U.S. courts.<sup>6</sup> The first case being *Pemex* which presents an unusual situation where a U.S. court declined to nullify a foreign arbitral award, despite the courts of the foreign jurisdiction granting an annulment.<sup>7</sup> The second case, *Thai-Lao Lignite*, sees the Second Circuit side with the foreign jurisdiction, and vacate a judgement based on an annulled foreign award.<sup>8</sup> The two cases together provide a road map to this relatively narrow issue for parties who may seek recognition (or to avoid recognition) of a foreign arbitral award in the Second Circuit, or in other U.S. jurisdictions where the Second Circuit provides persuasive guidance. This article will summarize the *Pemex* and *Thai-Lao Lignite* cases and then synthesize their respective tests for whether an annulled foreign arbitral award should nonetheless be given effect in the United States.

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Convention in a United States court should be confident that it has presented a *prima facie* case by submitting an authenticated original or copy of the arbitration agreement and arbitral award”); *see, e.g.,* *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 930 (D.C. Cir. 2007) (holding in a case involving an arbitral award annulled in the foreign jurisdiction that “because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of the award under the FAA or the New York Convention”). However, both conventions also provide that jurisdictions where recognition and enforcement is sought *may* refuse to recognize and enforce the arbitrated award if doing so would be “contrary to the public policy” of that country. *See* Panama Convention, *supra* note 3, at art. 5(2)(b); *see also* New York Convention, *supra* note 4, at art. V(2)(b).

<sup>6</sup> *See* Panama Convention, *supra* note 3, at art. 5(2)(b); *see also* New York Convention, *supra* note 4, at art. V(2)(b); *see also* *Baker Marine, Ltd. v. Chevron, Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999) (noting the permissive “may” in “award may be refused,” but holding that the party seeking refusal of recognition of the foreign judgments in that case had “shown no adequate reason for refusing to recognize the judgements”).

<sup>7</sup> *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016), cert. dismissed, 137 S. Ct. 1622, 197 L. Ed. 2d 746 (2017).

<sup>8</sup> *Thai-Lao Lignite Co. v. Gov’t of the Lao People’s Democratic Republic*, 864 F.3d 172 (2d Cir. 2017).

I. *PEMEX*A. *Introduction*

The first words of Justice Jacobs' opinion in the *Pemex* case are: "[t]he *truly unusual* procedural history of this case requires us to reconcile two settled principles that militate in favor of opposite results."<sup>9</sup> "Truly unusual" is a valid way to describe the result of *Pemex*, where the Second Circuit declined to enforce a judgment of a foreign court that annulled an arbitrated award.<sup>10</sup> Instead, the Second Circuit gave effect to the original arbitral award for approximately \$300 million, even after that award was given no effect in the original forum state, Mexico.<sup>11</sup>

B. *Factual background*

The *Pemex* case involved a contract dispute between two companies, Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. (COMMISA) and Pemex-Exploración Y Producción (PEP).<sup>12</sup> COMMISA was a Mexican subsidiary of a United States construction and military contracting corporation, while PEP was a subsidiary of Petroleos Mexicanos, a petroleum company which acted on behalf of the Mexican government.<sup>13</sup> PEP and its parent company were both technically public entities of the Mexican government, and Petroleos Mexicanos was essentially *the* Mexican state's oil and gas company.<sup>14</sup>

In 1997, COMMISA was contracted by PEP "to build oil platforms in the Gulf of Mexico," with the contract including an arbitration clause that required contract disputes be arbitrated in Mexico City in accordance with International Chamber of Commerce arbitration regulations.<sup>15</sup> Additionally, PEP was authorized under the contract to unilaterally exercise an "Administrative Recission" clause if COMMISA breached, and COMMISA was required to post performance bonds.<sup>16</sup> In 2003, after COMMISA and PEP disagreed over certain logistical, cost,

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<sup>9</sup> *Pemex*, 832 F.3d at 97.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 97–98.

<sup>15</sup> *Id.* at 98.

<sup>16</sup> *Id.*

and construction-related issues with the performance of the 1997 contract, the two parties executed a new contract with “virtually-identical arbitration and administrative rescission clauses” to the original contract.<sup>17</sup>

Despite the new contract, the parties were still unable to ensure a successful deal.<sup>18</sup> In 2004, PEP alleged that COMMISA had failed to meet milestones set out in the contract.<sup>19</sup> They ejected COMMISA from the job sites (where construction was 94 percent complete) and announced their intent “to administratively rescind the contracts.”<sup>20</sup> COMMISA filed for arbitration seated in Mexico City and beginning in 2005, even though PEP had asserted that they were rescinding the contract.<sup>21</sup> In a preliminary award in late 2006, the arbitration panel enjoined PEP from collecting the performance bonds COMMISA had posted until the final arbitral award was issued.<sup>22</sup> After the preliminary award/injunction was made by the arbitral body, PEP raised its contention that under Mexican law the administrative rescission it was pursuing was not subject to arbitration.<sup>23</sup>

As the arbitration proceeded, Mexican law changed in two notable ways.<sup>24</sup> First, in late 2007, jurisdiction for claims like COMMISA’s was given exclusively to the Mexican Tax and Administrative court, and the applicable statute of limitations was reduced from ten years to forty-five days.<sup>25</sup> Second, in mid-2009, Section 98 of the Law of Public Works and Related Services was enacted, which ended arbitration for administrative rescission claims like the ones COMMISA made against PEP.<sup>26</sup>

PEP had contended after the preliminary arbitration award that administrative rescission was exempt from arbitration, since its use of administrative rescission stemmed directly from the Mexican government’s authority.<sup>27</sup> However, the arbitration panel rejected this argument and awarded \$300 million in damages to COMMISA in December 2009, finding that PEP had breached the contracts.<sup>28</sup>

COMMISA took the award to be confirmed in the United States District Court for the Southern District of New York, which ruled in

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 98–99.

<sup>23</sup> *Id.* at 99.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

COMMISA's favor in August 2010.<sup>29</sup> PEP appealed that decision to the Second Circuit while simultaneously fighting the award in Mexico in the Eleventh Collegiate Court.<sup>30</sup> With the Second Circuit appeal still pending, the Mexican court ordered the \$300 million award annulled on the basis that the rescission was not arbitrable, due to the Mexican government's being involved through PEP, referencing Section 98 several times.<sup>31</sup>

The simultaneous action in the Second Circuit was remanded down to the Southern District of New York for consideration of the effect of the Mexican court's decision.<sup>32</sup> After hearing additional evidence on "applicable Mexican legal provisions," the district court declined to annul the award, holding that doing so would "[violate] basic notions of justice in that it [would apply] a law that was not in existence at the time the parties' contract was formed and [would leave] COMMISA without an apparent ability to litigate its claims."<sup>33</sup> The district court specifically noted that Section 98 was applied retroactively "to favor a state enterprise," and that COMMISA would be unable to seek any remedy for its claims since the claims would exceed the new, shortened statute of limitations.<sup>34</sup> PEP then appealed the judgment back to the Second Circuit.<sup>35</sup>

### C. Holding

The Second Circuit held that the court for the Southern District of New York did not exceed its authority nor abuse its discretion in declining to nullify the arbitrated award or to include in its judgment the \$106 million in performance bonds that PEP had collected.<sup>36</sup> Giving effect to the Mexican nullification of the award would, from Circuit Judge Jacobs, "run counter to United States public policy and would (in the operative

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* The Eleventh Collegiate Court is analogous to the United States Court of Appeals for the D.C. Circuit. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 100 (quoting the district court's decision on the matter in *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción*, 962 F.Supp.2d 642, 644 (S.D.N.Y. 2013)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 97.

phrasing) be ‘repugnant to fundamental notions of what is decent and just’ in this country.”<sup>37</sup>

#### D. Reasoning

The Second Circuit based its holding on a narrow public policy exception within the Panama Convention, which overcame the “pro enforcement bias” of that agreement.<sup>38</sup> To meet the exception, the court listed four influencing factors: “(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.”<sup>39</sup>

##### i. The Panama Convention

Adopted in 1975, the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”) is an agreement signed by nineteen American countries, including the United States and Mexico that directs courts to generally enforce arbitral awards rendered abroad.<sup>40</sup> Within the text of the convention however, there are seven enumerated exceptions to enforcement of a foreign ruling; these include things like situations when a party could not present a defense at arbitration and situations when the arbitration was not carried out according to agreed-upon terms or in accordance with local laws.<sup>41</sup> The final exception, latched onto by the Second Circuit in *Pemex*, comes into play when “the recognition or execution of the decision would be contrary to the public policy (“order public”) of that State [where recognition and execution is requested].”<sup>42</sup>

The Second Circuit in *Pemex* followed the reasoning of another Second Circuit case, *Ackermann v. Levine*, in holding the Panama Convention rule to mean that “[a] judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”<sup>43</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 105–07.

<sup>39</sup> *Id.* at 107.

<sup>40</sup> See Panama Convention, *supra* note 3, at art. 5(2)(b).

<sup>41</sup> *Id.* at art. 5(1)–5(2).

<sup>42</sup> *Id.* at art. 5(2)(b).

<sup>43</sup> See *Pemex*, 832 F.3d at 106 (quoting *Ackermann v. Levine*, 788 F.2d 830, 831 (2d Cir. 1986)); see also *Ackermann*, 788 F.2d at 842 (noting that two



ii. Considerations for the Public Policy Exception

The *Pemex* court considered “four powerful considerations” in analyzing whether the “high hurdle” of the public policy exception would apply.<sup>44</sup> These were: “(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.”<sup>45</sup>

a. Waiver of Sovereign Immunity

The Second Circuit noted that the waiver of sovereign immunity factor favored COMMISA, primarily since PEP had failed to raise the issue of immunity (specifically, immunity from having to arbitrate the rescission).<sup>46</sup> PEP had knowingly entered into a contract that specifically limited COMMISA to arbitration in seeking remedy for a breach—thus, the immunity had been waived through the contract.<sup>47</sup> The Second Circuit held that allowing PEP’s claim of immunity would run counter to contract law’s core idea: that parties’ expectations within the agreement (here, COMMISA’s expectation that arbitration was a valid option) should be enforced.<sup>48</sup>

b. Retroactive Legislation

According to the Second Circuit, the Mexican court’s retroactive application of Section 98 had an impermissible negative effect on the integrity of the contract.<sup>49</sup> The *Pemex* court held “[r]etroactive legislation that cancels existing contract rights is repugnant to United States law . . . ‘[e]lementary considerations of fairness dictate that individuals should

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important considerations are the goal of comity, which drives the doctrine of respecting foreign judgements, and the necessity of fairness to litigants).

<sup>44</sup> See *Pemex*, 832 F.3d at 107.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 108 (“[c]ontract law . . . is designed to enforce parties’ contractual expectations” (quoting *Hunt Constr. Grp. v. Brennan Beer Gorman/Architects, P.C.*, 607 F.3d 10, 14 (2nd Cir. 2010))).

<sup>49</sup> *Id.*

have an opportunity to know what the law is and to conform their conduct accordingly.”<sup>50</sup> With the PEP-COMMISSA contract, it was “incontestable that the capacity of PEP to arbitrate was established in prior law; that it was withdrawn with respect to certain disputes that had already arisen; and that it was withdrawn in a way that frustrated contractual expectation.”<sup>51</sup>

### c. Forum Availability

According to the Second Circuit, because COMMISA’s claims were now subject to a shorter statute of limitations, as well as the changes that Section 98 made to the arbitrability of administrative rescission claims, COMMISA was “twice the victim of unforeseen changes in the law.”<sup>52</sup> Both of those changes resulted in COMMISA’s inability to have its claims heard if the arbitration award was not enforced—this runs entirely counter to the Second Circuit’s holding that “litigants with legal claims should have an opportunity to bring those claims somewhere.”<sup>53</sup>

### d. Illegal Government Takings

Finally, PEP rescinded the contracts and removed COMMISA from the project sites after the work was essentially finished, and then the Mexican government legislatively removed all of COMMISA’s routes to potential relief.<sup>54</sup> These two facts deemed to mean that a “taking of private property without compensation for the benefit of the government” had occurred.<sup>55</sup> While this would be clearly unconstitutional in the United States, the North American Free Trade Agreement also contains a provision that prohibits expropriation without payment of compensation.<sup>56</sup>

### E. *Test as Articulated by Pemex*

The *Pemex* case addressed whether to recognize a foreign decision, namely the annulment of the arbitral award for COMMISA, through the prism of the Panama Convention. Specifically, the court

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<sup>50</sup> *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 110.

<sup>53</sup> *Id.* at 109–10.

<sup>54</sup> *Id.* at 110–11.

<sup>55</sup> *Id.* at 110.

<sup>56</sup> *Id.*

looked to Article 5 section 2(b) of the Panama Convention, which allows a court discretion in recognition or execution of a foreign decision when recognition would “offend the public policy of the state in which enforcement is sought.”<sup>57</sup>

When making the decision, the court in *Pemex* started by stating the exception “does not swallow the rule” of a preference for “recognition and enforcement of foreign judgements.”<sup>58</sup> The rule is a “standard [that] is high, and infrequently met,” and judgements are against public policy when they are “repugnant to fundamental notions of what is decent and just.”<sup>59</sup> Such judgements include those that move to clearly “undermine the public interest, the public confidence in the administration of the law, or [the] security for individual rights of personal liberty or of private property.”<sup>60</sup>

The Second Circuit looked to “four powerful considerations” to test whether the district court’s refusal to confirm the award, in the face of the Mexican annulment, met this high standard and qualified for the public policy exception.<sup>61</sup>

First, the court addressed whether or not there had been a contractual waiver of sovereign immunity.<sup>62</sup> The court held that the arbitration agreement between the parties functioned to waive sovereign immunity for PEP, especially since PEP had only attempted to assert sovereign immunity in the “twelfth-hour.”<sup>63</sup>

Second, the court considered the repugnance of retroactive application of laws to U.S. law.<sup>64</sup> The Mexican court stated that it was not retroactively applying Section 98.<sup>65</sup> However, the Second Circuit held that the fact that law empowered PEP to arbitrate and then revoked that power in regards to certain disputes with the passing of Section 98 removed any remedy for COMISSA against PEP. The court held that this revocation was a retroactive application of the law.<sup>66</sup> Adding to this, the court stated:

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<sup>57</sup> *Id.* at 105–06 (quoting *Ackerman v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986)).

<sup>58</sup> *Id.* at 106.

<sup>59</sup> *Id.* at 107.

<sup>60</sup> *Id.* at 106.

<sup>61</sup> *Id.* at 107.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 107–08.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 108.

<sup>66</sup> *Id.* at 108–109.

“[t]hat PEP is part of the government that promulgated the law does not help at all.”<sup>67</sup>

Third, the Second Circuit held that “COMMISA’s inability to have its breach of claims heard magnifies the injustice.”<sup>68</sup> It stated, based on the idea of *forum non conveniens*: “litigants with legal claims should have an opportunity to bring those claims somewhere.”<sup>69</sup> In *Pemex*, if COMMISA’s award was not confirmed, COMMISA would not have faced just a statute of limitations barrier but also *res judicata* issues in Mexican court.<sup>70</sup>

Finally, the court considered whether or not there had been a government taking without compensation. Citing *Tahoe-Sierra Presidential Council, Inc. v. Tahoe Regional Planning Agency*,<sup>71</sup> the Second Circuit held that the state-owned PEP’s seizure of the project sites without compensation and the subsequent removal of relief by Mexican law combined to mean that there had been an unconstitutional taking under United States law.<sup>72</sup>

## II. THAI-LAO LIGNITE CO

The year after the *Pemex* decision the Second Circuit, again, addressed the issue of the enforcement of annulled foreign arbitral awards in *Thai-Lao Lignite*.<sup>73</sup> However, in the *Thai-Lao Lignite* case, the party petitioning the court did so with a Rule 60(b) motion for relief from judgement, meaning that there was more to consider than the bare international law concerns of the Panama Convention.<sup>74</sup> But, there is

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<sup>67</sup> *Id.* at 109.

<sup>68</sup> *Id.* at 110.

<sup>69</sup> *Id.* at 109.

<sup>70</sup> *Id.* at 110.

<sup>71</sup> See *id.* at 110 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.”)).

<sup>72</sup> *Id.* at 110–11.

<sup>73</sup> *Thai-Lao Lignite Co. v. Gov’t of the Lao People’s Democratic Republic*, 864 F.3d 172, 177 (2d Cir. 2017).

<sup>74</sup> See Fed. R. Civ. P. 60(b) (“On motion and just terms, *the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons*: . . . (5) the judgment has been satisfied, released, or discharged; *it is based on an earlier judgment that has been reversed or vacated*; or applying it prospectively is no longer equitable”) (emphasis added). See also *Thai-Lao Lignite Co. v. Gov’t of the Lao People’s Democratic Republic*, 864 F.3d 172 (2d Cir. 2017).

significant overlap between Rule 60(b) considerations and the Panama Convention and New York Convention, with analysis for those conventions dovetailing nicely in to the Federal Rules requirements within the Second Circuit.

*A. Factual background*

As with the *Pemex* case, *Thai-Lao Lignite Co.* involved a dispute surrounding an allegedly wrongfully terminated business contract.<sup>75</sup> In 1994, Thai-Lao Lignite Co., LTD (“TLL”), a Thai corporation, and the Government of the Lao People’s Democratic Republic (“Laos”) signed the contract in question.<sup>76</sup> By agreement, TLL had done business conducting mining operations in Laos for several years prior.<sup>77</sup>

The 1994 contract was a “Project Development Agreement” (“PDA”) that granted TLL the right to build and manage an electrical plant near the mining site.<sup>78</sup> Under the agreement, TLL would secure its own funding for construction of the power plant.<sup>79</sup> However, over the next twelve years, TLL failed to obtain funding, due in part to a regional financial downturn from 1997-2000.<sup>80</sup> In 2006, Laos contacted TLL to express concern that the company would not fulfill its obligations under the PDA.<sup>81</sup> TLL’s response did not satisfy Laos, and in October 2006, Laos notified TLL that Laos was terminating the PDA.<sup>82</sup> TLL contended that the termination lacked appropriate procedure, and thus, Laos breached the PDA.<sup>83</sup>

After failing to reach a settlement, the two parties initiated arbitration proceedings in 2007 in Malaysia, according to the forum selection clause in the PDA.<sup>84</sup> The hearing was in mid-2009, and in November 2009, the arbitration panel issued an award for TLL.<sup>85</sup> The panel ruled that TLL’s failure to raise required funding did not breach the PDA, but that Laos’s subsequent termination of the contract did constitute

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<sup>75</sup> *Id.* at 177.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 178.

<sup>85</sup> *Id.*

a breach.<sup>86</sup> In total, the panel awarded a little over \$5 million to TLL, including \$40 million in investment costs, \$4 million in lost opportunity costs, and interest and attorney's fees.<sup>87</sup> Malaysian law incorporates a limitation that an application to set aside an arbitrated award must be made within ninety days of the award's issuance; Laos did not apply to set aside the award before the deadline in February 2010.<sup>88</sup>

In June 2010, TLL began efforts to enforce the award by filing an action in New York state court that sought confirmation of the Malaysian panel's judgment.<sup>89</sup> Laos immediately removed the action to federal court, namely to the United States District Court for the Southern District of New York.<sup>90</sup> In district court, Laos argued that the action be dismissed, asserting that the panel had wrongfully incorporated costs and had decided issues related to other contracts between the parties signed prior to the PDA.<sup>91</sup> In August 2011, the district court ruled for TLL and enforced the arbitrated award, concluding that Laos's objections "did not raise issues of jurisdiction or arbitrability," and thus fell outside of the New York Convention's grounds for non-enforcement.<sup>92</sup> The court held further that even if Laos had raised either of these appropriate challenges, the court still would have enforced the award since "the parties agreed to delegate questions of arbitrability and jurisdiction to the panel."<sup>93</sup> Laos appealed the district court judgment to the Second Circuit, who affirmed the ruling below.<sup>94</sup>

Concurrent with its efforts to obtain enforcement in the United States, TLL had also sought the same legal action in the UK and France.<sup>95</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 179.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* The New York Convention also allows for refusal to enforce an award if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced . . ." United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(c), June 10, 1958, 21 U.S.T. 2517.

<sup>93</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 179 (quoting *Thai-Lao Lignite (Thai.) Co. v. Gov't of the Lao People's Democratic Republic*, 2011 U.S. Dist. LEXIS 87844, at \*45 (S.D.N.Y. Aug. 3, 2011)).

<sup>94</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 179.

<sup>95</sup> *Id.*

In 2010, TLL was successful in the High Court of Paris; however, a Parisian appeals court subsequently reversed that judgment, concluding the “Panel had improperly ruled on matters outside the scope of the arbitration agreement.”<sup>96</sup> The High Court of Justice of England and Wales held for TLL and enforcement of the award in August 2011, as well.<sup>97</sup>

Shortly after filing with the district court in New York, Laos had requested that that court stay the proceeding because Laos “had moved in Malaysia to set aside the award.”<sup>98</sup> However, Laos’ counsel in Malaysia had not in fact filed the action in that country, so the district court proceeded with the action.<sup>99</sup> However, the Malaysian High Court eventually accepted Laos’ application to set aside the award and at the same time granted an extension to the statute of limitations for filing such an application.<sup>100</sup>

In December 2012, the Malaysian High Court “annulled the [a]ward, and ordered re-arbitration of the dispute before a new panel.”<sup>101</sup> The High Court held that while other courts (including in the U.S.) had already rejected Laos’ other challenges, the arbitration panel had indeed exceeded its jurisdiction and among other things had “impermissibly lumped together or co-mingled” the separate issues of the PDA and the prior contracts.<sup>102</sup> The Malaysian Court of Appeal affirmed the High Court’s judgement in 2014.<sup>103</sup>

Two months after the initial annulment, in February 2013, Laos moved under Federal Rule of Civil Procedure 60(b)(5), (“Rule 60(b)”), to vacate the district court judgement in New York, citing the Malaysian annulment.<sup>104</sup> This was more than a year and a half after the district court had originally entered judgment for TLL.<sup>105</sup> TLL objected to the motion to vacate, arguing first that Laos should not have been granted an extension by the Malaysian court to file the set-aside action and, arguing second, that Laos’ illegal conduct was inequitable and should keep Laos from any Rule 60(b) relief.<sup>106</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 180

<sup>102</sup> *See id.* (internal quotation marks omitted).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*; *see also* Fed. R. Civ. P. 60(b)(5).

<sup>105</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 180.

<sup>106</sup> *Id.*

The district court granted the Rule 60(b) motion in February 2014 and vacated its previous judgement against Laos.<sup>107</sup> In doing so, it held that it was required by the New York Convention to give effect to the Malaysian set-aside judgement, unless “giving effect to the judgment would violate our ‘fundamental notions of what is decent and just.’”<sup>108</sup> The court weighed the alleged misconduct by Laos when applying this standard, but found that the issues did not “rise to the level of violating basic notions of justice such that [it] should ignore comity considerations and disregard the Malaysian judgments.”<sup>109</sup> TLL requested that the court require Laos to post security while an appeal to the order to vacate was pending—this was denied.<sup>110</sup>

Further, the district court rejected TLL’s request to enforce the judgement from the English court, holding that “the later Malaysian judgment should have priority because Malaysia, as the seat of the arbitration and therefore the primary jurisdiction under the New York Convention, had the sole authority to determine whether the arbitral award was valid and, if not, to set it aside.”<sup>111</sup> TLL appealed the district court case to the Second Circuit.<sup>112</sup>

### *B. Holding*

The Second Circuit affirmed the vacating order from the district court. The Circuit court concluded that the district court acted appropriately in not recognizing the English judgement and in not requiring Laos to post security pending appeal.<sup>113</sup>

### *C. Reasoning*

In addressing the annulment of the Malaysian award, the Second Circuit looked first to Rule 60(b), which covers the grounds for relief from judgements available to litigants in federal courts.<sup>114</sup> Next, it addressed Article 5 of the N.Y. Convention,<sup>115</sup> which covers recognition and

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<sup>107</sup> *Id.*

<sup>108</sup> See *id.* at 180–81 (quoting *Thai-Lao Lignite (Thai.) Co. v. Gov’t of the Lao People’s Democratic Republic*, 997 F. Supp. 2d 214, 221 (S.D.N.Y. 2014)).

<sup>109</sup> See *Thai-Lao Lignite Co.*, 997 F. Supp. 2d at 223.

<sup>110</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 181.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*; see also Fed. R. Civ. P. 60(b).

<sup>115</sup> See 21 UST 2517.



enforcement of awards from foreign arbitrations.<sup>116</sup> Both of these emphasize a preference for respecting the previous judgement or award, and place a strong burden on the parties opposing the judgements.

i. Rule 60(b)

Rule 60(b) was not considered in the *Pemex* case, but addresses the federal standard for relief from rulings and reads in relevant part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

....

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable<sup>117</sup>

The Second Circuit noted that the relief provided by this statute is to be “based on the particular circumstances of the case, taking into account the reason for any delay, the possible prejudice to the non-moving party, and the interests of finality.”<sup>118</sup> Also, the relief falls into equity, so it is not available if the party requesting relief “is found to have acted inequitably.”<sup>119</sup> as “final judgements should not be lightly reopened.”<sup>120</sup>

ii. The New York Convention

The New York Convention of 1958<sup>121</sup> addressed recognition across borders of arbitrated awards, and was adopted by the members of the United Nations.<sup>122</sup> Essentially identical to the later Panama Convention, the New York Convention, in its Article 5, lays out grounds

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<sup>116</sup> See *Thai-Lao Lignite Co.*, 864 F.3d at 181; see also 21 UST 2517 art. V.

<sup>117</sup> Fed. R. Civ. P. 60(b).

<sup>118</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 182 (internal quotation marks omitted).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* (quoting *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986)).

<sup>121</sup> See 21 UST 2517.

<sup>122</sup> *Id.*

for non-recognition of foreign judgements through seven exceptions to the general rule that such judgements should be enforced.<sup>123</sup> Those exceptions, like the exceptions under the Panama Convention, cover situations where a party is unable to present their defense, where the arbitration procedures that were agreed upon or were laws of the forum jurisdiction were not followed, or, with relevance to the *Thai-Lao Lignite* case, where the award has been “set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”<sup>124</sup> The final exception under Article 5 section 2(b) is especially relevant: recognition and enforcement may be refused if “. . . (b) The recognition or enforcement of the award would be contrary to the public policy of [the country where recognition is sought].”<sup>125</sup>

The Second Circuit, in *Thai-Lao Lignite*, cited *Pemex*’s holding that “the prudential concern of international comity” governs the ultimate scope of a court’s discretion in choosing to enforce or to not enforce a judgement coming from a foreign jurisdiction under the New York Convention’s Article 5 exceptions.<sup>126</sup> *Pemex*’s recognition of a “strong presumption in favor of following the primary jurisdiction’s ruling” was also adopted by the Second Circuit.<sup>127</sup> The analysis of the *Thai-Lao Lignite* court differed from the analysis in *Pemex* however, since there was no consideration of Rule 60(b) in that previous ruling.

TLL argued before the Second Circuit that Rule 60(b)’s preference for both finality of judgements and deference to foreign decisions was not weighed heavily enough by the district court. This meant, according to TLL, that Laos had incorrectly lacked the burden to demonstrate their entitlement to 60(b) relief from the 2011 U.S. judgement.<sup>128</sup> Laos’ opposing argument was that the New York Convention requires “giving conclusive effect to the Malaysian annulment of the [a]ward.”<sup>129</sup>

Preliminarily, the Second Circuit found that Rule 60(b) applied to motions to vacate awards that are subsequently annulled.<sup>130</sup> For this, it cited Article 3 of the New York Convention, which calls for enforcement of awards “in accordance with the rules of procedure of the territory where

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<sup>123</sup> 21 UST 2517 art. V(1) (stating that “[r]ecognition and enforcement of the award may be refused . . . only if” the party against whom the judgement is invoked provides proof of seven exceptions).

<sup>124</sup> 21 UST 2517 art. V(1)(e).

<sup>125</sup> 21 UST 2517 art. V(2)(b).

<sup>126</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 183–84.

<sup>127</sup> *Id.* at 184.

<sup>128</sup> *Id.* at 184–85.

<sup>129</sup> *Id.* at 185.

<sup>130</sup> *Id.*

the award is relied upon.”<sup>131</sup> The court held that “[i]n our view, Rule 60(b) is one such ‘rule of procedure.’”<sup>132</sup>

iii. “the full range of considerations”

The Second Circuit held that Rule 60(b) motions, based on later-annulled arbitral awards, are not governed entirely by the New York Convention’s “concern for comity.”<sup>133</sup> Rather, “the full range of Rule 60(b) considerations, including the weighty interests served by protecting the finality of judgments of our courts” must be considered.<sup>134</sup> Further, courts “must be attentive to the fact that the burden of demonstrating the vacatur is appropriate lies with the party seeking that result.”<sup>135</sup> This burden “need not be an onerous” one though, “and it need not require too much more from the district court than was done here,” but it “does require recognition and consideration of the interests protected by Rule 60(b).”<sup>136</sup>

Applying this to the *Thai-Lao Lignite* facts, the Second Circuit “presume[d] that the district court, in its diligence, considered the Rule 60(b) factors,” even while noting that a more explicit consideration by the lower court “would have been helpful.”<sup>137</sup> The Second Circuit based its presumption on a number of observations of the district court’s reasoning.<sup>138</sup>

First, it noted that the district court “gave some explicit consideration to the interests of justice” in noting that the Malaysian annulment “did not leave [TLL] . . . without a remedy,” and noting that the dispute would be re-arbitrated.<sup>139</sup> This contrasted with *Pemex*, where a particular combination of changed laws, statute of limitation issues, and an annulment came together to “preclude[e] any future recovery.”<sup>140</sup>

Next, the Second Circuit looked at the district court’s recognition of what the appellate court called “far less suspect” circumstances in the Malaysian proceedings contrasted with the circumstances around the

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 185.

<sup>133</sup> *Id.* at 186–87.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 187.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 187.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

proceedings in *Pemex*.<sup>141</sup> These “less suspect” circumstances meant that the annulment ruling was “more worthy of presumptive recognition.”<sup>142</sup> While not explicitly spelled out in *Thai-Lao Lignite*, the concerning circumstances in *Pemex* that the court refers to seem likely to be the changes in Mexican laws that happened to benefit a government-owned entity in a potentially *very* expensive arbitration.<sup>143</sup> In *Pemex*, the Second Circuit had used the “four powerful considerations” of public policy: waiver of sovereign immunity, repugnancy of retroactive legislation, the need to find a forum, and a concern for illegal government takings.<sup>144</sup> In *Thai-Lao Lignite* however, the court held that while “we might not necessarily agree with the merits of the Malaysian courts’ judgments, we see no grounds for such concerns.”<sup>145</sup>

#### a. Inequitable Conduct

The Second Circuit continued its analysis by concluding that the “inequitable conduct” that TLL asserted Laos engaged in did not “justif[y] denying Laos the relief from enforcement that it requests.”<sup>146</sup> It found that the allegedly inequitable conduct was “largely, the merits of legal positions taken, and not egregious behavior of another sort,” and had already been properly addressed and given no weight by the district court below prior to the appeal.<sup>147</sup>

Some of the principal conduct that TLL complained about involved Laos’ failure to comply in timely fashion with discovery orders from the district court—this was also considered by the court below which declined at the time to issue sanctions upon TLL’s request.<sup>148</sup> The Second Circuit held that if the district court had considered the conduct “in the

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 110 (2nd Cir., 2016) (“PEP, acting on behalf of the Mexican government, rescinded the contracts and forcibly removed COMMISA from the project sites. Then, by legislation, Mexico frustrated relief that had been granted to COMMISA in the arbitral forum and consigned it to a forum in which relief was foreclosed both by the statute of limitations and *res judicata*. . . . the enforcement of [the new] Mexican law amounted to a taking of private property without compensation for the benefit of the government.”).

<sup>144</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 187.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 188.

context of Laos's Rule 60(b)(5) motion," the lower court would still not have found the issue so egregious as to be enough to "justify its continued enforcement of an annulled award."<sup>149</sup> It seemed to agree with Laos' argument that if the district court would have held that the conduct was enough to prevent vacatur of the annulment, Laos would have been on the hook for a \$57 million judgement that would have essentially been equivalent to a discovery sanction, an impliedly unnecessarily "steep fine indeed."<sup>150</sup>

Other conduct by Laos that TLL complained about "is best described as either unnecessarily combative or careless," and the Second Circuit was "not persuaded that it demonstrate[d] the kind of 'chutzpah' that has led courts in this Circuit to deny otherwise merited relief, or that the [d]istrict [c]ourt . . . would have seen as outcome-determinative."<sup>151</sup> To support this, the Second Circuit contrasted Laos' behavior with the behavior in one of the Circuit's previous cases, *Uzan*, where Rule 60(b) relief had been denied because the moving party had "not pursued their defense with clean hands[,] . . . time and again . . . rais[ing] legal roadblocks to the enforcement of the judgment against them . . . and persistently endeavor[ing] to evade the lawful jurisdiction of the [d]istrict [c]ourt and undermine its careful and determined work."<sup>152</sup> Laos' behavior, according to the court, fell far short of the "persistent disrespect and noncompliance for which we and the district court criticized the unsuccessful movants in *Uzan*."<sup>153</sup>

## b. Interest in Finality

Last, the Second Circuit considered the "interest in finality," which protects harm to the previously prevailing party from "repeated and otherwise unfounded challenges to its judgments."<sup>154</sup> It rejected Laos' contention that the timing of a motion to vacate is "irrelevant," saying that "[h]ad ten years elapsed before the set-aside proceedings were concluded," plus "more time elapsed before Laos moved to vacate the [a]ward," finality interests may have overcome the "deference to the primary

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<sup>149</sup> *Id.* at 188.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (citing *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127–28 (2009)).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

jurisdiction presumptively called for by the New York Convention.”<sup>155</sup> However, the court found that the district court acted properly in vacating the prior judgement due to the Malaysian annulment, in part because TLL knew that annulment proceedings were ongoing even while TLL was seeking to have their award enforced in the district court.<sup>156</sup> Also, Laos had “sought relief promptly” once the Malaysian court annulled the arbitral award.<sup>157</sup>

c. TLL’s Request for Posting of Security

The district court did not require Laos to post security for the amount of the contested award for two reasons.<sup>158</sup> First, “requiring Laos, a foreign sovereign, to post security would be tantamount to attachment of Laos’ assets,” violating the Foreign Sovereign Immunities Act (FISA).<sup>159</sup> Second, the lower court remarked that even without a FISA bar, it would still not require the security based on its discretion.<sup>160</sup> The Second Circuit affirmed the district court simply saying that the lower court would have been within its discretion either way; and thus, the question of whether or not FISA would bar the security request did not need to be addressed.<sup>161</sup>

d. Enforcement of the English Judgment

Finally, the Second Circuit rejected TLL’s argument that the judgment previously secured in England against Laos should be enforced based on the New York Uniform Foreign Country Money-Judgements Recognition Act.<sup>162</sup> Under that provision, TLL had filed for enforcement and the clerk of court had issued a notice of default against Laos in the Southern District of New York after Laos had failed to initially appear.<sup>163</sup>

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<sup>155</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 189.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *See id.*; *see also* 28 U.S.C. § 1610(a) (2012) (“The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if. . . . (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication . . .”).

<sup>160</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 189.

<sup>161</sup> *Id.* at 190.

<sup>162</sup> *Id.* at 190; *see also* N.Y. CPLR §§ 5301–09.

<sup>163</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 190.

Laos subsequently appeared before the default judgement was entered and moved to vacate the default, in response to which the district court placed the burden on TLL to show cause as to why the English judgement should not be denied enforcement.<sup>164</sup> After hearing TLL's response the district court denied enforcement of the judgement, based on leeway within the New York statute for "conflicts with [other] final and conclusive judgment[s]" and equitable considerations, and then, closed the case.<sup>165</sup> The Second Circuit agreed in a straightforward manner with the district court's reasoning and affirmed the order denying the petition to enforce the judgement.<sup>166</sup>

#### *D. Test as Articulated in Thai-Lao*

Unlike *Pemex*, where recognition of a foreign decision was viewed through the lens of the Panama Convention only, the court in *Thai-Lao* was forced to address FRCP Rule 60(b) in addition to an international treaty. The Second Circuit overlaid the Rule 60(b) elements onto the New York Convention considerations, coming up with a test that satisfied both the FRCP and the Convention.<sup>167</sup> This test looked at the reasonableness of the time period between the initial judgement and the motion to vacate, the equitable conduct of the party moving to vacate, and a balance between concerns for justice and finality and the concern for international comity.<sup>168</sup>

The timing of Laos' motion to vacate was held not to be unreasonable so that it outweighed the deference to the primary jurisdiction, Malaysia.<sup>169</sup> This timing is a part of the interest in finality specifically, "which protects the prevailing party's (and the courts') tangible interest in avoiding the costs, uncertainty, and even disrespect reflected by repeated and otherwise unfounded challenges to its judgments."<sup>170</sup> The court stated that ten years of set-aside proceedings plus additional time for Laos to move to vacate "might well outweigh the deference" but did not hold that the current case's timeline (three years from the arbitrated award to the conclusion of the Malaysian set-aside action and then two months from the annulment to the motion to vacate)

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 186.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 188–89.

<sup>170</sup> *Id.* at 188.

combined with the prompt seeking of relief by Laos was enough to keep Laos from relief.<sup>171</sup>

Laos' "inequitable conduct" was not enough to bar relief either, since it involved "the merits of legal positions taken, and not egregious behavior of another sort."<sup>172</sup> The court did not detail what this "behavior of another sort" might be, but went on to quote the district court that Laos' conduct regarding discovery orders "did not 'evinced[] bad faith or serious and studied disregard for the orderly process of justice,' as would be required to warrant a sanctions award," and that Laos had taken "reasonable (if ultimately mistaken) legal position[s]."<sup>173</sup> The Second Circuit noted that this district court analysis of Laos' conduct had not been in the context of Rule 60(b) but held that it would nonetheless generate same ultimate result if the lower court had been considering Rule 60(b).<sup>174</sup> Further, other conduct by Laos was "unnecessarily combative or careless," not reaching the level of the unclean hands and "persistent disrespect and noncompliance" of the movant denied in *Uzan*.<sup>175</sup>

The Second Circuit looked to the interests of justice, noting that there was, unlike in *Pemex*, a route to a remedy for TLL (through re-arbitration).<sup>176</sup> In the context of the interests of justice, the court acknowledged the "four powerful considerations" articulated in *Pemex*, but found that they were unnecessary in *Thai-Lao* since the Malaysian proceedings were "far less suspect and therefore more worthy of presumptive recognition."<sup>177</sup>

Combining this lack of "suspect" proceedings with a reasonable timetable for Laos' motion, the Second Circuit declined to hold that the concern for international comity was outweighed.<sup>178</sup>

### III. COMBINING THE TESTS

*Pemex* and *Thai-Lao* provided a test applicable at least within the Second Circuit that can be synthesized. For situations where an arbitral award is annulled in its jurisdiction of origin, *Pemex* focused on an international treaty, and *Thai-Lao* expanded the treaty analysis to include

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 187.

<sup>173</sup> *Id.* at 188 (quoting *Thai-Lao Lignite Co. v. Gov't of the Lao People's Democratic Republic*, 2013 U.S. Dist. LEXIS 110353 at \*5 (S.D.N.Y. 2013)).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*; see also *Motorola Credit Corp. v. Uzan*, 561 F.3d 123 (2nd Cir. 2009).

<sup>176</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 187.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 187–189.



a number of factors connected to Rule 60(b).<sup>179</sup> The combined test looks to a balance of justice and comity, specifically at “four powerful considerations,” and then gives consideration to an interest in the finality of judgments/timeliness of relief and to the equitable conduct of the party seeking relief.

Whether a court chooses to apply the Panama Convention or the New York Convention, “[t]here is no substantive difference between the two: both evince a ‘pro-enforcement bias.’”<sup>180</sup> Under both conventions, this enforcement is to be effected according to the laws of the state where enforcement is sought.<sup>181</sup> This bias comes from a concern for “international comity,”<sup>182</sup> with the goal of promoting “cooperation and reciprocity” and stands despite all but some of the most substantial challenges.<sup>183</sup> Overriding this presumption in favor of the primary

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<sup>179</sup> *Id.* at 186 (“[I]n ruling on a Rule 60(b)(5) motion, even in the context of a judgment entered on a foreign arbitral award under the New York Convention, a district court should be guided by the full range of interests protected by Rule 60(b). Courts should consider whether the motion was made within a reasonable time, whether the movant acted equitably, and whether vacatur would strike an appropriate balance between serving the ends of justice and preserving the finality of judgments, as well as the prudential concern for international comity.”).

<sup>180</sup> *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 105 (2d Cir. 2016), cert. dismissed, 137 S. Ct. 1622, 197 L. Ed. 2d 746 (2017).

<sup>181</sup> Article III of the New York Convention places on each contracting state the obligation to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.” *Thai-Lao Lignite Co.*, 864 F.3d at 183; *see also* Panama Convention, 14 I.L.M. 336 art. 4 (“[An arbitral award’s] execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.”).

<sup>182</sup> *Pemex*, 832 F.3d at 106 (“Although courts in this country have long recognized the principles of international comity and have advocated them in order to promote cooperation and reciprocity with foreign lands, comity remains a rule of ‘practice, convenience, and expediency,’ rather than of law.” (quoting *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997))).

<sup>183</sup> *See Thai-Lao Lignite Co.*, 864 F.3d at 186 (“[U]nder the Convention, the power and authority of the local courts of the [primary jurisdiction] remain of paramount importance.” (internal quotation marks omitted) (quoting *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997))).

jurisdiction must, under either convention's Article 5, involve an appeal to "fundamental notions of what is decent and just" and be against the public policy of the United States.<sup>184</sup>

*Pemex* balanced justice and comity with "four powerful considerations," which test whether recognizing and enforcing a foreign award would run afoul of that public policy.<sup>185</sup> These four considerations are: "(1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation."<sup>186</sup>

In the United States, valid contractual waivers of sovereign immunity must be enforced.<sup>187</sup> Contract law "is designed to enforce parties' contractual expectations,"<sup>188</sup> and parties cannot, as in *Pemex*, validly contract for arbitration but then subsequently invoke sovereign immunity.<sup>189</sup> A judgement that allows a party to invoke sovereign immunity in that situation would be against the public policy of the United States.<sup>190</sup>

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"The annulment of an arbitral award in the primary jurisdiction should therefore be given significant weight." *Id.*

<sup>184</sup> *Pemex*, 832 F.3d at 106. Enforcement of the [foreign] judgement must "offend the public policy" of the United States, which would mean the judgement is "repugnant to fundamental notions of what is decent and just." *Id.* Another federal circuit, the Fifth, has held that limiting a seaman's choice-of-law by contract in an arbitration clause is not enough to meet the high standard of the public policy exception in the New York Convention. *See Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1018–20 (5th Cir. 2015) ("[W]e should be reluctant to conclude that lesser remedies make an award unenforceable on policy grounds . . . . [T]he district court only determined that the arbitration and award "effective[ly] deni[ed]" *Asignacion* the right to pursue his general maritime remedies. But that finding is insufficient to support the conclusion that the public policy of the United States *requires* refusing to enforce the award.") (emphasis added).

<sup>185</sup> *Pemex*, 832 F.3d at 106.

<sup>186</sup> *Id.* at 107.

<sup>187</sup> *Id.*; *see also* *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418–23 (2001) ("[T]he Tribe clearly consented to arbitration and to the enforcement of arbitral awards . . . the Tribe thereby waived its sovereign immunity from . . . suit.").

<sup>188</sup> *Hunt Constr. Grp., Inc. v. Brennan Beer Gorman/Architects, P.C.*, 607 F.3d 10, 14 (2d Cir. 2010).

<sup>189</sup> *See Pemex*, 832 F.3d at 108.

<sup>190</sup> *Id.*

The *Pemex* court held that “[r]etroactive legislation that cancels existing contract rights is repugnant to United States law [because] ‘[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.’”<sup>191</sup> It is against public policy to penalize a party who contracts under a law simply because that law is retroactively changed.<sup>192</sup>

The Second Circuit held that “litigants with legal claims should have an opportunity to bring those claims somewhere.”<sup>193</sup> A statute of limitations bar enacted retroactively, so that a party effectively never has an opportunity to bring a claim, might be enough to trigger this consideration that legal claims must find a forum.<sup>194</sup> However, certainly if a party must contend with statute of limitations issues plus more barriers, an “injustice” results.<sup>195</sup> In *Pemex*, one such additional issue creating equitable concerns was *res judicata*—the Mexican court’s ruling applying new laws retroactively silenced any future relief in court for the party seeking to have the award upheld, and “[s]uch a result offends basic domestic principles of claim preclusion.”<sup>196</sup>

It is against public policy for a judgment to constitute the “taking of private property without compensation for the benefit of the government.”<sup>197</sup> The court in *Pemex* also noted that the North American Free Trade Agreement likewise contains a provision that prohibits

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<sup>191</sup> *Id.* (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 109. “The general rule of mootness is relaxed for issues that are ‘capable of repetition, yet evading review’ because otherwise parties would be left ‘without a chance of redress.’” *Id.* (quoting *S. Pac. Terminal Co. v. Interstate Com. Comm’n*, 219 U.S. 498, 515 (1911)).

<sup>194</sup> *Id.* at 110.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action.”) (emphasis added by the court to the quotation)).

<sup>197</sup> *Id.* at 110. *See also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 322 (2002) (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.”); *see also* *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007) (“The test of public policy cannot be simply whether the courts of a secondary State would set aside an arbitration award if the award had been made and enforcement had been sought within its jurisdiction.”).

expropriation without payment of compensation.<sup>198</sup> Enforcement of an arbitral award that would amount to an illegal government taking in the United States would obviously be against the public policy of the United States.<sup>199</sup>

*Thai-Lao* saw these four considerations as one part of the test when looking at a Rule 60(b) motion as well, since they provided insight as to whether or not recognition of the foreign award would be contrary to the “ends of justice”.<sup>200</sup> However, these four factors do not need to be considered in every case.<sup>201</sup> In *Thai-Lao*, the court stated, “we see no grounds for such concerns,” referring to these four factors, after looking at the circumstances in the Malaysian proceedings.<sup>202</sup> Impliedly, circumstances that would necessitate the four-factor test of public policy violation (and thus potentially impact the ends of justice) would be those like in *Pemex*, where a government-owned party benefits from changed laws and circumvents basic tenets of contract law (deference to party choice).<sup>203</sup>

The second factor for considering Rule 60(b) motions from *Thai-Lao* is an interest in the finality of judgments.<sup>204</sup> Essentially, this factor looks to whether the original judgment (in *Thai-Lao*, the original enforcement award) has been around for so long that it is “locked in” and should not be changed. This interest in finality might be overcome by

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<sup>198</sup> *Pemex*, 832 F.3d at 110.

<sup>199</sup> *Id.* at 111 (holding that the Mexican judgement annulling the arbitral award and amounting to an illegal taking “would undermine public confidence in laws and diminish rights of personal liberty and property.”) (emphasis added).

<sup>200</sup> *Thai-Lao Lignite Co. v. Gov’t of the Lao People’s Democratic Republic*, 864 F.3d 172, 184 (2d Cir. 2017).

<sup>201</sup> *Id.* at 187.

<sup>202</sup> *See id.* (holding that the Malaysian *proceedings* were “far less suspect” than the proceedings in Mexico in *Pemex*).

<sup>203</sup> *See id.* *See also* *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 940 (D.C. Cir. 2007) (“Because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it.”); *see also* *Getma Int’l v. Republic of Guinea*, 862 F.3d 45, 50 (D.C. Cir. 2017) (“there is scant evidence of taint in the [foreign] proceedings, and we see no infirmities that prejudiced Getma in a manner so offensive to “basic notions of morality and justice” as to justify disregarding the [foreign] decision.”).

<sup>204</sup> “Properly applied Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments.” *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986). The interest in finality can be described as “ensuring that litigation reaches an end within a finite period of time.” *See House v. Secretary of Health & Human Services*, 688 F.2d 7, 9 (1982).

“extraordinary circumstances” like those of *Pemex*.<sup>205</sup> The timing of the motion comes into play as well—*Thai-Lao* holds that ten years of set-aside proceedings between the original foreign judgment and the annulment plus more for the Rule 60(b) motion process “might” be enough to overcome the interest in finality.<sup>206</sup> A shorter time, like the three years in *Thai-Lao*, is likely not enough for a court following the Second Circuit test to find that the interest in the finality of such a relatively recent judgment is so strong that the judgment cannot be overturned.<sup>207</sup>

Finally, the equitable conduct of the party seeking non-recognition of the foreign judgment must also be assessed. Here, “unclean hands” can be enough to deny relief via Rule 60(b), as in *Motorola Credit Corporation v. Uzan*, where the party requesting relief had “persistently endeavored to evade the lawful jurisdiction of the [d]istrict [c]ourt.”<sup>208</sup> The conduct in that case was described as “persistent disrespect and noncompliance” by the Second Circuit in *Thai-Lao*, and was an example of the kind of conduct that would prevent a party from Rule 60(b) relief.<sup>209</sup> There is at least some consideration of the amount of the judgment in connection with whatever this conduct might be. In *Thai-Lao*, some of the alleged “inequitable conduct” was related to discovery.<sup>210</sup> The court there found that enforcing the foreign judgment based only on relatively innocuous discovery-related actions by the party seeking non-recognition of the judgment would essentially result in a massive discovery sanction.<sup>211</sup> This, the court implied, would not be in keeping with the interests of justice.<sup>212</sup>

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<sup>205</sup>See also *In re Terrorist Attacks on September 11, 2001* (Kingdom of Saudi Arabia), 741 F.3d 353, 357 (2d Cir. 2013) (holding that the interest in finality was overcome with “extraordinary circumstances”).

<sup>206</sup> *Thai-Lao Lignite Co. v. Gov’t of the Lao People’s Democratic Republic*, 864 F.3d 172, 189 (2d Cir. 2017).

<sup>207</sup>But see *Kingdom of Saudi Arabia*, 741 F.3d at 357 (“Whenever the law changes, parties who lost a prior case because of the now-altered law may feel that justice was not done. Generally, the interest in finality outweighs that concern.”).

<sup>208</sup> *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 n.5 (2d Cir. 2009).

<sup>209</sup> *Thai-Lao Lignite Co.*, 864 F.3d at 188.

<sup>210</sup> See *id.* at 187–88.

<sup>211</sup> *Id.* at 188.

<sup>212</sup> *Id.*

## CONCLUSION

The Second Circuit's addressing of this narrow issue in these two cases provides at least some direction for parties seeking enforcement of foreign judgments regarding arbitral awards in the United States. However, between *Pemex* and *Thai-Lao* there is still plenty of room for subsequent cases with distinguishable facts.

The "truly unusual" (read: egregious) facts in *Pemex* meant that all "four powerful considerations" readily favored non-enforcement of the foreign judgment. But what happens when, for example, legislation is actively applied retroactively (one factor) but there is none of the governmental expropriation (another factor) found in *Pemex*? Similarly, the *Thai-Lao* court's assertion that ten years "might" be enough to lock in a previous judgment, and thus induce a court to decline to enforce a subsequent set-aside, leaves a continuing question. Consider a hypothetical future case with an initial judgment enforced in the Second Circuit, say, nine years before the set-aside judgment in the foreign jurisdiction is rendered. How many of the other factors (the four powerful considerations as well as equitable concerns) would have to weigh in favor of non-enforcement for the court to say "nine years seems like too much time, since the finality of judgments is important and combining this with the other factors we hold that the subsequent judgment should not be enforced"?

This then must be the main takeaway from these two cases; the factors articulated in *Pemex* and *Thai-Lao* are just that: factors. *Pemex* gave an example of when almost all the factors favored non-enforcement of the foreign arbitral judgment, and *Thai-Lao*, while providing some contrasting guidance in dicta, gave an example of when almost all the factors favored enforcement of the foreign judgment. Therefore, while the test for whether foreign arbitral set-aside judgments should be enforced in the Second Circuit is now relatively clear, future precedent is necessary to better predict how varying facts will be analyzed using the test.

